

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION**

Estate of STEVEN BRODER, by James H. Jackson,
personal representative,

Plaintiff,

vs.

CORRECTIONAL MEDICAL SERVICES, INC.,
its medical director CRAIG HUTCHINSON, and
BENCY MATHAI, and employees of the Michi-
gan Department of Corrections, namely GEORGE
PRAMSTALLER, medical director, and JAN EPP,
regional medical director, all in their individual
capacities,

Defendants.

File No. 03-75106
Hon. Marianne O. Battani
Mag. Judge Paul J. Komives

**PLAINTIFF'S RESPONSE TO CMS DEFENDANTS' MOTION TO DISMISS CLAIMS
FOR EXEMPLARY AND PUNITIVE DAMAGES AND ATTORNEYS' FEES**

Introduction

The Court accepted the plaintiff's second amended complaint on April 13, 2009. *See R. 148, Order Granting Plaintiff Leave to Amend.* The second amended complaint renews the demand in the first amended complaint for compensatory, exemplary, and punitive damages commensurate with the injuries Mr. Broder suffered. *See R. 149.* The Court allowed the claims for exemplary and punitive damages in the second amended complaint over the objection of the CMS defendants. *See R. 146, CMS Brief in Opposition to Amendment.* Now the CMS defendants have filed a motion to dismiss the plaintiff's claims for exemplary and punitive damages and attorneys' fees, on the same grounds. *See R. 167.* The plaintiff responds and asks the Court to deny the defendants' motion.

Statement of Facts

Steven Broder filed suit in 2003 for the damages he suffered due to the late diagnosis and

late treatment of his throat cancer. In 2007 his throat cancer came back, requiring massive surgery in May 2008. Despite the surgery, the cancer came back again in late 2008, resulting in his death in December 2008. His estate was named the plaintiff in the case in early 2009. The personal representative filed an amended complaint to add the damages that Mr. Broder suffered in 2008. There were no heirs at law to make a claim for their own damages under the state Wrongful Death Act. Mr. Broder's estate seeks the damages that he would have been entitled to had he lived. The state Survival Act, MCL § 600.2921, provides that the estate stands in the shoes of the deceased and can recover exactly what the plaintiff would have been entitled to recover had he survived.

Argument

Michigan's Survival Statute allows an action pending at the time of the plaintiff's death to be amended to comply with Michigan's Wrongful Death Act, MCL § 600.2922. *See* MCL § 600.2921. If properly amended, the action may seek additional damages resulting from the death. *Theisen v. Knake*, 236 Mich. App. 249, 256; 599 N.W.2d 777 (1999). The WDA allows the plaintiff to "stand in the shoes of the decedent and prosecute his action for him." *Id.* at 258.

The plaintiff has complied with the requirements of the WDA by substituting James Jackson, the personal representative of Mr. Broder's estate, as the plaintiff in this action following Mr. Broder's death. *See* MCL § 600.2922(2). The Survival Statute and the WDA preserve the entirety of Mr. Broder's § 1983 claim. Thus, the second amended complaint claims all damages that would have been available to Mr. Broder had he survived, including exemplary and punitive damages and attorneys' fees.

Exemplary damages compensate for injury to feelings caused by conduct "so willful and wanton that it constitutes a reckless disregard of the plaintiff's rights." *Veselenak v. Smith*, 414

Mich. 567, 572-73; 327 N.W.2d 261 (1982). The purpose of exemplary damages is not to punish the defendant, but to render the plaintiff whole. *Jackson Printing Co. v. Mitani*, 169 Mich. App. 334, 341; 425 N.W.2d 791 (1988).

The second amended complaint also seeks punitive damages. In a § 1983 claim, punitive damages may be awarded “when the defendant willfully and intentionally violates another’s civil rights or when the defendant acts with reckless or callous indifference to the federally protected rights of others.” *Gordon v. Norman*, 788 F.2d 1194, 1199 (6th Cir. 1986). The purpose of punitive damages, like the purpose of § 1983, is to deter future egregious conduct. *Smith v. Wade*, 461 U.S. 30, 51 (1983).

The plaintiff properly asserted the claims for exemplary and punitive damages in the original § 1983 action and these claims survive Mr. Broder’s death under the Survival Statute; thus, his estate may pursue them now.

1. Recent Federal Decisions Establish that All Damages Otherwise Available in a § 1983 Action Remain Available When the Claim is Pursued After the Victim’s Death.

The CMS defendants contend that the WDA must specifically allow for exemplary and punitive damages in order for the plaintiff to pursue them. The CMS defendants argue that the WDA precludes these types of damages because they are not specifically listed in the statute.

The CMS defendants misunderstand the purpose of the WDA as applied to this case. In this case, the WDA simply allows the action pending at the plaintiff’s death to survive by permitting a personal representative to pursue the claim on the decedent’s behalf. It is true that for cases brought *solely* under the WDA – on behalf of heirs or claimants other than the deceased – neither punitive nor exemplary damages are allowed. *Fellows v. Superior Products Co.*, 201 Mich. App. 155, 158; 506 N.W.2d 534, 536 (1993). This makes perfect sense, as those claimants could not have suffered punitive or exemplary damages; their damages are derivative. The key

distinction between a case such as *Fellows* and the instant case is that this case does not rely on the WDA as a *cause of action*. The plaintiff has simply re-styled the § 1983 claim to comply with the WDA so that it may be pursued after Mr. Broder's death.

The Western District of Michigan has recently considered this precise issue and held that in a § 1983 claim for deliberate indifference to medical needs that resulted in wrongful death, the plaintiff may recover all damages normally available under federal civil rights law. In *Murphy v. Gilman*, 551 F. Supp. 2d 677 (2008), the court held that the WDA did not preclude the plaintiff from seeking punitive damages and damages for intentional infliction of emotional distress because those damages are generally available for a § 1983 claim. *Murphy*, at 683-85. The court said that "federal standards govern the determination of damages under the civil rights statutes." *Murphy* at 684 (citing *Gordon v. Norman*, 788 F.2d 1194, 1199 (6th Cir. 1986)) (emphasis in original). Indeed, even though punitive damages are not disallowed by the WDA as to Mr. Broder's own survival claim for the harm he suffered in 2001-02 or in 2008, if they *were* disallowed, "punitive damages can be awarded under § 1983 *even where they would not normally be recoverable under . . . local law.*" *Id.* (emphasis in original).

In another prisoner civil rights claim for serious indifference to medical needs brought under the WDA after the prisoner's death, the court used the same reasoning to allow the plaintiff to seek punitive damages. *Valarie v. Michigan Dep't of Corrections*, No. 2:07-cv-5, 2008 U.S. Dist. LEXIS 93558, at *21 (W.D. Mich. Nov. 17, 2008). Thus, in the same factual context as the instant case, federal courts in Michigan have rejected the defendants' argument that the WDA precludes exemplary and punitive damages in a § 1983 action.

In other words, the WDA does not take away legitimate damage claims the decedent himself would have had under § 1983. The plaintiff does not need to rely on the WDA as an inde-

pendent basis for his exemplary and punitive damages claims. The absence of a provision for them under the WDA is “irrelevant.” *Murphy*, 551 F. Supp. 2d at 685.

Murphy and *Valarie* are also consistent with state court decisions interpreting the WDA. Indeed, the *Murphy* quote, at 684, that “punitive damages can be awarded under § 1983 *even where they would not normally be recoverable under . . . local law*” comes from a Michigan case. *See Janda v. City of Detroit*, 175 Mich. App. 120, 129; 437 N.W.2d 326, 331(1989)). In *Theisen v. Knake*, 236 Mich. App. 249, 255; 599 N.W.2d 777 (1999), the Michigan Court of Appeals clarified that under the WDA, “the personal representative of a deceased . . . stands in the deceased’s place for all purposes *incident to the enforcement of that claim, including rights and privileges personal to the deceased in his lifetime*” (quoting *McNitt v. Citco Drilling Co.*, 60 Mich. App. 81, 88; 230 N.W.2d 318 (1975) (emphasis in original)). The intervening death of a plaintiff “neither limits nor precludes the type of damages that could have been recovered by the person had the person survived.” *Thorn v. Mercy Mem’l Hosp. Corp.*, 281 Mich. App. 644, 651; 761 N.W.2d 414 (2008).

These decisions show that regardless of whether the underlying action is grounded in state or federal law, the function of the WDA is the same: where a plaintiff dies from an injury for which he had a pending cause of action, the WDA is not a filter that eliminates all or part of the *plaintiff’s pending claim*. It is simply a mechanism that enables a personal representative to “step into the decedent’s shoes” and prosecute the claim under the applicable law. The limitations on relief in the WDA apply only to the extent that new claims are being made on behalf of derivative plaintiffs who have suffered *different* (and more limited) damages than the deceased plaintiff. For a § 1983 action, this means that the personal representative can pursue all claims

stemming from the “rights and privileges personal to the deceased” under federal civil rights law, including punitive and exemplary damages, and attorneys’ fees allowed by law.

2. The List of Recoverable Damages in the Wrongful Death Act Is Illustrative, Not Exhaustive, and Does Not Preclude Recovery for Other Types of Damages.

Even if this Court were to decide that exemplary and punitive damages must be independently authorized by the WDA in order for the plaintiff to pursue them after Mr. Broder’s death, the plaintiff would still be allowed to go forward with these claims. Contrary to the defendants’ interpretation of the WDA, a particular form of damages is not precluded simply because section 6 of the WDA fails to specifically reference it. *Miller v. State Farm Mut. Auto Ins. Co.*, 410 Mich. 528, 560; 302 NW2d 537 (1981); *Thorn v. Mercy Mem’l Hosp. Corp.*, 281 Mich. App. 644, 653; 761 N.W.2d 414 (2008).

Section 6 of the WDA provides as follows:

The court or jury may award damages *as the court or jury shall consider fair and equitable*, under all the circumstances *including* reasonable medical, hospital, funeral and burial expenses for which the estate is liable; reasonable compensation for the pain and suffering, while conscious, undergone by the decedent during the period intervening between the time of the injury and death; and damages for the loss of financial support and the loss of society and companionship of the deceased.

MCL § 600.2922(6) (emphasis added). This list of potential damages provided in section 6 is meant to highlight the type of increased damages available as a result of death. *See Hawkins v. Regional Med. Lab.*, 415 Mich. 420, 436-38; 329 N.W.2d 729 (1982) (discussing the legislative history and intent of the WDA). It is not, as the defendants contend, an exhaustive list that is meant to extinguish other claims properly brought as part of the plaintiff’s underlying action. The term “including” as used in section 6 “indicates an intent by the Legislature to permit the award of *any type* of damages, economic and noneconomic, deemed justified by the facts of the particular case.” *Thorn* at 651 (emphasis added). The fact that medical malpractice suits result-

ing in death are prosecuted under the WDA “does not change the character of such actions except to expand the elements of damage available.” *Jenkins v. Patel*, 471 Mich. 158, 165; 684 NW2d 346 (2004). Thus, Michigan courts have considered and rejected the CMS defendants’ argument that section 6 provides an exhaustive list of damages recoverable under the WDA.

In making this argument, the CMS defendants cite an older line of cases that has been superseded by more recent decisions. For example, the defendants rely on language in *Bernier v. Board of County Road Commissioners*, 581 F. Supp. 71, 80 (W.D. Mich. 1983), to argue that because the WDA contains no provision for recovery of exemplary damages, a plaintiff may not recover them. *Bernier* is unreliable authority for two reasons. First, it relies on the erroneous holding in *Endykiewicz v. State Highway Comm’n*, 414 Mich 377; 324 NW2d 755 (1982), that the WDA creates a new cause of action for the sole benefit of the decedent’s beneficiaries, a holding the Michigan Supreme Court has since overruled. *Bernier*, 581 F. Supp. at 80 (citing *Endykiewicz*, at 760, *overruled in relevant part by Wesche v. Mecosta Road Comm’n*, 480 Mich. 75, 91; 746 NW2d 847 (2008)). *Wesche* makes clear that the WDA does not create a new cause of action as to the plaintiff, but rather allows the underlying claim to survive enhanced by the measure of damages available as a result of death. *Wesche*, 480 Mich. at 91. The second reason *Bernier* should not be applied to this case is that since reaching that holding, the Western District has expressly rejected the idea that damages must be listed in section 6 to be recoverable under the WDA. *See, e.g., Murphy*, 551 F. Supp. 2d at 685.

Other cases that the CMS defendants rely on have been similarly superseded by more recent decisions. For example, the defendants cite a statement from *Fellows v. Superior Products Co.*, 201 Mich. App. 155; 506 N.W.2d 534 (1993)), that exemplary and punitive damages are not recoverable under the WDA because they do not appear in section 6, but the Court of

Appeals expressly reversed this position in *Thorn*. *Thorn*, 281 Mich. App. at 653 (discussing *Fellows*). *Thorn* labels this statement from *Fellows* as mere “dicta” that is “not dispositive” of the issues presented in the particular case. *Id.* The Court of Appeals also reversed its position because *Fellows*, like *Bernier*, relied on *Endykiewicz*’s now-repudiated understanding of the WDA. *Id.* at 652-53.

The CMS defendants also point to dicta in *Frontier Insurance Co. v. Blaty*, 454 F.3d 590, 599 (6th Cir. 2006), stating that the WDA “must be narrowly construed so that only those damages explicitly provided for in the act are recoverable.” The defendants’ reliance on *Blaty* is “misplaced.” See *Murphy*, 551 F. Supp. 2d at 684. *Blaty* was a § 1983 action where the plaintiff sought damages for the decedent’s loss of enjoyment of life. 454 F.3d at 598. As the *Blaty* court correctly noted, a decedent’s loss of enjoyment of life (unlike punitive and exemplary damages) is not recoverable under § 1983, and it is also not recoverable under the WDA because the WDA only permits recovery to the plaintiff for pain and suffering experienced consciously “between the time of injury and death.” 454 F.3d at 599 (citing MCL § 600.2922(6)).

In contrast, the exemplary and punitive damages the plaintiff seeks in this case do not violate the WDA because they would compensate plaintiff for the suffering Mr. Broder experienced before his death. Furthermore, because § 1983 permits exemplary and punitive damages, the plaintiff does not need to point to a particular provision in the WDA authorizing such claims. *Murphy* at 684. *Blaty* did not consider the availability of punitive or exemplary damages under the WDA and its dicta is not controlling here. *Id.* This Court should follow *Murphy* and hold that the WDA does not preclude exemplary and punitive damages otherwise available under § 1983.

Finally, the Court should note that while the defendants' brief repeatedly cites to *Polec v. Northwest Airlines* (In re Air Crash Disaster), 86 F3d 498 (6th Cir. 1996), for the proposition that the WDA precludes exemplary and punitive damages, nowhere in *Polec* does the Sixth Circuit interpret Michigan's WDA. Nor does the case discuss the availability of exemplary and punitive damages in an action pursued after the original plaintiff's death. *Polec* has no bearing on the issue of whether the plaintiff may claim exemplary and punitive damages in this case.

3. The Facts Support the Plaintiff's Claims for Exemplary and Punitive Damages.

As a result of the defendants' denial of adequate medical care over a period of seven years, Mr. Broder suffered mental and emotional anguish in addition to extraordinary physical injury. *See* R. 149, Second Amended Complaint, p.11. He suffered humiliation during the many occasions when his most basic needs were neglected. *Id.* at 7-8. The plaintiff will not be made whole with compensation only for Mr. Broder's physical pain and suffering.

The defendants' reasoning would lead to the perverse result that where a plaintiff does not survive the medical malpractice committed against him, the party responsible for the malpractice does not have to make the plaintiff whole. The Michigan Supreme Court has made it clear that the WDA does not require such an outcome: "dead medical malpractice victims are entitled to no lesser damages than living medical malpractice victims," and the WDA allows the "decedent's estate to recover everything the decedent would have been able to recover" had he lived. *Shinholster v. Annapolis Hosp.*, 471 Mich. 540, 565; 685 NW2d 275 (2004). Precluding exemplary and punitive damages would contravene the basic principal that "the more egregious the injury, the greater the damages . . . any other result would be contrary to the history of litigation in this area of the law, which sought to assure that wrongdoers would be held accountable to their victims." *Id.*; *see also Thorn*, 281 Mich. App. at 660 (expressing similar concerns).

The CMS defendants have produced no authority directly on point stating that the WDA precludes recovery for exemplary and punitive damages in a § 1983 action. The Western District has recently spoken twice on this exact issue and left no ambiguity: in a § 1983 action, the WDA does not preclude recovery for damages otherwise available under federal civil rights law. The deterrence function of a § 1983 claim also cannot be served if the plaintiff is not permitted to seek punitive damages. Mr. Broder's death only heightens the concern to deter the defendants from future egregious conduct. This Court should allow the plaintiff to pursue his claim for exemplary and punitive damages.

Conclusion

For the above reasons, the plaintiff asks the Court to deny the CMS defendants' motion to dismiss the plaintiff's claims for exemplary and punitive damages and for attorneys' fees under § 1988. Alternatively, the Court can take this response as the plaintiff's motion *in limine* seeking a ruling that all damages that the plaintiff himself could have been awarded had he survived (as set forth in the second amended complaint) are appropriate to be tried under the state Survival Act.

Respectfully submitted,

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Dated: September 9, 2009

Proof of Service

The above response to the CMS defendants' motion to dismiss claims for exemplary and punitive damages and attorneys' fees was filed using the Court's ECF system, which will send same-day e-mail notice and copies to all counsel of record.

s/ Paul D. Reingold

Dated: September 9, 2009